

FEDERAL MAGISTRATES COURT OF AUSTRALIA

RAFI v MINISTER FOR IMMIGRATION & ANOR [2012] FMCA 1002

MIGRATION – Judicial review of decision of the Migration Review Tribunal – cancellation of Subclass 880 (Skilled – Independent Overseas Student (Residence)) visa – skills assessment undertaken by Trades Recognition Australia – not approved and specified as an assessing body – whether Trades Recognition Australia skills assessment can be relied on as a bogus document – Tribunal finding that if correct information provided by applicant no visa would have been granted – application dismissed.

Migration Act 1958 (Cth), ss.97, 101(b), 103, 107, 109
Migration Regulations 1994 (Cth), reg. 2.41

Batra v Minister for Immigration and Citizenship [2012] FMCA 544
Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577
Gurinder Singh v Minister for Immigration and Citizenship [2012] FMCA 145
Minister for Immigration and Citizenship v Brar [2012] FCAFC 30
Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145
Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634
Saleem v Migration Review Tribunal and Anor [2004] FCA 234
SHJB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 303
SZEEM v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FMCA 27

Applicant:	MUHAMMAD RAFI
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 413 of 2011
Judgment of:	Hartnett FM
Hearing date:	6 August 2012

Delivered at: Melbourne

Delivered on: 7 November 2012

REPRESENTATION

Counsel for the Applicant: Ms Burchell

Solicitors for the Applicant: Da Gama Pereira & Associates

Counsel for the First
Respondent: Mr Horan

Solicitors for the First
Respondent: Sparke Helmore

THE COURT ORDERS THAT:

- (1) The application filed on 24 March 2011, amended on 4 July 2011 and further amended on 26 July 2011, be dismissed.
- (2) The applicant pay the first respondent's costs fixed in the sum of \$8,471.
- (3)

FEDERAL MAGISTRATES

COURT OF AUSTRALIA AT

MELBOURNE

MLG 413 OF 2011

MUHAMMAD RAFI

Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for review of a decision made by the Migration Review Tribunal ('the Tribunal') dated 24 February 2011 to cancel the applicant's Class DD Subclass 880 (Skilled – Independent Overseas Student (Residence)) visa under s.109(1) of the *Migration Act 1958* ('the Act'). In general terms, that subsection permits the Minister for Immigration and Citizenship ('the Minister') to cancel a visa where incorrect information has been provided in the visa application. The application was amended by amended application filed 4 July 2011, and then subsequently by further amended application filed 26 July 2011. The grounds of the application are as follows:

*“A. The Migration Review Tribunal (**the Tribunal**) failed to properly consider whether the applicant provided a “bogus document” in accordance with the statutory provisions of the Migration Act 1958 (Cth) (**the Act**).*

2. PARTICULARS

*1. The Trades Recognition Australia (**TRA**) is not a “person or body” within the meaning of reg. 2.26B of the Migration Regulations 1994.*

2. The first respondent’s purported delegation of power to the TRA under reg.2.26B of the Migration Regulation 1994 was invalid.

3. The first Respondent’s purported instrument of delegation IMMI 06/063 dated 30 November 2006 was invalid.

4. The TRA’s purported exercise of powers in relation to the applicant was invalid.

*5. Any purported exercise of power under reg.2.26B of the Migration Regulations 1994 by the Department of Education, Employment and Workplace Relationship (**DEEWR**) was invalid.*

6. Being void, the TRA assessment could not have been material to the decision to grant the visa, and so it was not a “bogus document” within the meaning of s 97(b) and s 103 and the applicant did not make a false and misleading statement to the an officer (sic) of the Department.

7. Accordingly the delegate of the first respondent cannot cancel the visas for the reasons particularised in the s 107 notice because it particularises breaches of s 101(b) and 103 of the Migration Act 1958 (Cth) that are based on false or misleading information to the TRA and the delegate of the first respondent about something that is a nullity.

8. The Tribunal failed to consider whether the TRA was a person or body as required by reg 2.26B.

B. The Tribunal fell into jurisdictional error in concluding that the TRA was the relevant assessing authority for the occupation of a Cook.

3. PARTICULARS

(1) There is no evidence that TRA or any other person or body has been approved in writing by the Education Minister or the Employment Minister for the purpose of reg.2.26B, to be the relevant assessing authority for the occupation of Cook.

(2) The Tribunal erred in determining that instrument IMMI 06/063 for the purpose of reg 2.26B(1), relevantly specifying Trade Recognition Australia to be the relevant assessing authority for the occupation of Cook, is valid.

(3) Without a validly approved and specified (re 2.26B(1)) relevant assessing authority for the occupation of Cook, Schedule 2, clause 880.230 was not capable of being met by the Applicant. Thus in the circumstances, Schedule 2, clause 880.230 was not applicable to this application.”

4. The first respondent seeks a dismissal of the application on the basis that the application does not establish any jurisdictional error in the decision of the Tribunal dated 24 February 2011.
5. There is also relied upon by the applicant an affidavit affirmed by him on 24 March 2011, together with contentions of fact and law filed 4 July 2011 and further written submission filed 26 July 2012. The first respondent filed a court book and relies upon contentions of fact and law filed 15 July 2011.

Background

6. On 29 August 2007, the applicant made an application for a Class DD Subclass 880 Skilled – Independent Overseas Student (Residence) visa.
7. In respect thereto:
 - a) the application was made electronically as an internet application. Supporting documents were subsequently sent to the Department of Immigration and Citizenship (‘the Department’);
 - b) the supporting documents included:
 - i) a letter from a restaurant called Via Veneto dated 20 April 2007 which stated that the applicant had been working in the restaurant between 13 March 2006 and 6 January 2007 in

the position of a cook assistant, under the supervision of a head chef, and had contributed more than 900 hours to the restaurant; and

- ii) a letter from a Trades Recognition Australia ('TRA') skills assessor dated 25 May 2007 ('the TRA assessment') which stated that the applicant had been successful in an assessment of his training and work experience for the occupation of cook. The TRA relied in part on the work reference.

8. On 27 November 2008, on the basis of the TRA assessment, and other material factors, the applicant was granted a Class DD Subclass 880 Skilled – Independent Overseas Student (Residence) visa.
9. Following an investigation conducted by the Department, information was obtained that the letter from Via Veneto had been fabricated in return for payment.
10. On 4 June 2010, a delegate of the Minister gave the applicant a Notice of Intention to Consider Cancellation under s.107 of the Act ('the s.107 notice'). Particulars of possible non-compliance with ss.101(b) and 103 of the Act were included in the s.107 notice as follows:
 - a) in relation to non-compliance with s.101(b) of the Act, the s.107 notice referred to information that had been received by the Department indicating that the applicant may not have possessed the necessary work experience as a cook as he had claimed in evidence submitted to TRA. The s.107 notice stated:

"I consider therefore you have not complied with Section 101(b) of the Act because in support of your application and in order to satisfy the legislative requirements for the grant of a visa, you provided incorrect information to the department. You stated your nominated occupation as a Cook but you may not have the necessary skills to be classified as a Cook."
 - b) in relation to non-compliance with s.103 of the Act, the s.107 notice relevantly stated:

"... I consider that the work reference you submitted to TRA purported to have been issued by the owner/manager of Via

Veneto Restaurant was not genuine. I consider that you used these bogus documents to obtain a positive assessment from TRA.

As the skills assessment was obtained because of a false or misleading statement that skills assessment is considered to be a 'bogus document' within the meaning of section 97 of the Act.

You then presented this skills assessment to an officer of the department who was performing a function under the Act (that function being assessing the client's visa application).

In giving the TRA skills assessment, which is a bogus document to an officer of the department, you have failed to comply with s 103."

11. On or about 15 October 2010, the applicant's migration agent made submissions in response to the s.107 notice. The submissions were accompanied by a signed statement of the applicant, in which he admitted having paid money to obtain a fabricated work reference. The applicant also provided further documents to the delegate.
12. On 19 November 2010, a delegate of the Minister (the Delegate') decided to cancel the applicant's visa under s.109 of the Act. The Delegate found that the applicant had not complied with ss.101 and 103 of the Act, and exercised his discretion to cancel the visa.
13. On 24 November 2010, the applicant applied to the Tribunal for review of the Delegate's decision.

The Tribunal's decision

14. On 23 February 2011, the applicant appeared before the Tribunal to give evidence and present arguments.
15. It was noted by the Tribunal that the s.107 notice was required to be given to the applicant as a statutory precondition to the exercise of power to cancel a visa under s.109 of the Act. The Tribunal set out those sections of the Act in relation to which the s.107 notice alleged non-compliance by the applicant. They are useful to state here:
16. Section 101(b) of the Act is as follows:

“A non-citizen must fill in or complete his or her application form in such a way that:

(b) no incorrect answers are given or provided.”

17. Section 103 of the Act is as follows:

“A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.”

18. Section 109 of the Act gives the Minister power to cancel the visa and is as follows:

“(1) The Minister, after:

(a) deciding under section 108 that there was non-compliance by the holder of a visa; and

(b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and

(c) having regard to any prescribed circumstances;

may cancel the visa.

(2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.”

19. Regulation 2.41 of the *Migration Regulations 1994* (‘the Regulations’) lists the prescribed circumstances referred to in s.109(1)(c). Section 109(2) provides that if the Minister may cancel a visa under subsection 1, the Minister must do so if there exist circumstances declared by the Regulations to be circumstances in which a visa must be cancelled. There are no circumstances declared by the Regulations for the purposes of s.109(2) (in which a visa must be cancelled).

20. In exercising its powers of review under the Act in respect of a visa cancelled under s.109, the Tribunal must first decide whether there was non-compliance in the way described in the s.107 notice (*Saleem v Migration Review Tribunal and Anor* [2004] FCA 234 at paragraph

46). Thus, the Tribunal was required to direct its findings at the particulars of non-compliance which were given in the initiating notice, and no others (*SZEEM v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 27 at paragraph 32).

21. If the Tribunal concluded there was non-compliance by the applicant in the way described in the s.107 notice, then the Tribunal necessarily had to consider whether it was appropriate that the visa be cancelled. The power contained in s.109 is discretionary. In exercising this power, the Tribunal was required to consider the applicant's response to the s.107 notice about the non-compliance, and have regard to the prescribed circumstances as are set out in regulation 2.41 of the Regulations. Those prescribed circumstances are:

“(a) the correct information;

(b) the content of the genuine document (if any);

(c) the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document;

(d) the circumstances in which the non-compliance occurred;

(e) the present circumstances of the visa holder;

(f) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;

(g) any other instances of non-compliance by the visa holder known to the Minister;

(h) the time that has elapsed since the non-compliance;

(j) any breaches of the law since the non-compliance and the seriousness of those breaches;

(k) any contribution made by the holder to the community.”

22. The weight to be given to any one factor or group of factors is a matter for the decision maker and will vary from case to case. Further, it is for the applicant to shape the decision maker's consideration of those factors by reference to his or her individual circumstances, and the extent to which the decision maker is required to engage with each

factor will depend largely on the matters put forward by the applicant (*Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145).

23. While regulation 2.41 of the Regulations contains all of the considerations that must be taken into account, it is not an exhaustive statement of the factors that might properly be considered to be relevant in any given case (*Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145). The Tribunal may have regard to lawful government policy, and any other matter that the Tribunal considers relevant. The Tribunal will ordinarily apply lawful government policy unless there are cogent reasons against its application (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 per Bowen CJ & Deane J at 590, *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634 per Brennan J at 645). The relevant policy when cancellation is being considered under s.109(1) is set out in the Department's PAM3 'Visa Cancellation Powers (ss. 116, 128 and 140)'.
24. The applicant, when lodging his application for a skilled migration visa, claimed to have experience as a cook. At the time TRA relevantly required the applicant to have 900 hours experience as a cook. At the hearing before the Tribunal the applicant admitted as to the factual allegations against him, namely that he had paid an intermediary AUD\$2,700 to obtain a purported work reference which falsely claimed that he had completed 900 hours of relevant work experience at the Via Veneto restaurant. This document was submitted to TRA in support of an application for a skills assessment.
25. The Tribunal noted in its reasons the explanation given by the applicant for his behaviour which it set out in paragraphs 24 and 26 as follows:

“(24) The applicant claimed that he had come to Australia as a 21 year old, and after being here for a while, decided that he wanted to stay, and to acquire permanent residency “at any cost.” However, when questioned further by the Tribunal, he agreed that while still in Pakistan, he had specifically enrolled in a cookery course in Australia as an assured and rapid pathway to permanent residency, and that neither he nor his family had any background in the cookery/ hospitality industry. His mother is a teacher and his father an assistant pharmacist. He also agreed

that since acquiring the permanent visa, he has never worked in that industry, or any other skilled occupation. He said that he dealt with someone named Bunny at Della or any other skilled occupation. He said that he dealt with someone named Bunny at Della International College, who said that the Regulations were to change in September, and that the applicant could not rely on the hours that he had worked at another restaurant (E-gusto) to meet the work experience requirement, but that for a fee, someone could assist him to overcome that problem. He said that he did not know how many hours he worked with E-gusto restaurant, and that he was sorry for his conduct.

...

(26) The applicant said that he would not be welcomed in Pakistan, would not enjoy the same lifestyle, and “had issues” with his parents, whom he claimed were “forcing” him to marry a cousin. He concluded that he had “invested five precious years” of his life in Australia, and did not want to return to Pakistan.”

26. In consideration of the regulation 2.41 factors, the Tribunal noted the applicant had not worked as a cook since obtaining his visa in 2008 but rather worked as a security guard earning approximately AUD \$60,000 gross per annum. He was enrolled in a Bachelor of Accounting degree course at La Trobe University and was purchasing a home. He made contributions to the community and was involved in assisting other Pakistani students.
27. The Tribunal regarding the alleged breach of s.101 of the Act as misconceived and dismissed it.
28. The Tribunal accepted, on the evidence which included the applicant’s admissions, that the applicant failed to comply with s.103 of the Act in the way described in the s.107 Notice. Specifically, the Tribunal found the applicant provided a bogus document within the meaning of s.97 of the Act, being a TRA skills assessment that was obtained because of a false or misleading statement to an officer of the Department performing a function or purpose under the Act. The Tribunal then said in its reasons, at paragraph 30:

“The Tribunal acknowledges that the s.107 notice inaccurately described the applicant’s breach of s.103 as involving the provision of a bogus document “to an officer of the Department”, whereas it was in fact presented to an authorised system, having

been lodged online. However, the Tribunal does not consider that this minor, technical imprecision's on the part of the delegate prevented the applicant from knowing or answering the case against him, or that the s.107 notice should therefore be declared invalid. Whilst the courts have properly and understandably stressed the need for breach allegations to be soundly particularised in s.107 notices, their approach in gauging compliance with that percept has always been purposive rather than prescriptive. The Tribunal emulates that approach in dealing with the present matter."

29. And at paragraph 31:

"The Tribunal has read and considered the agent's submissions, which set forth an assortment of claims that go behind and beyond the applicant's non-compliance actions, e.g. that work experience should not be required for accreditation as a Cook, that it is impossible to obtain 900 hours of such experience, and that TRA is not a legal entity and therefore cannot be designated as a relevant assessing authority by the Minister. While the Tribunal commends the agent's diligence and creativity, it finds her arguments are misconceived, and in any event, has neither a need nor warrant to go behind the alleged breach in the ways she urges. The bogus character of the TRA skills assessment is in no way altered or diminished by the alleged invalidity to which she refers; it was, on the applicant's own admission, obtained because of a false or misleading statement. That is all that is required to bring it within the ambit of s.97(c). Moreover, the express terms of s.103 prohibit the presentation of any such bogus document to the Department, and do not provide for any exception in cases of dispute legal validity."

30. The Tribunal noted it was also satisfied that 900 hours of work experience was a precondition of accreditation by the TRA as a cook and that a positive TRA assessment was a condition of being granted 60 points in the General Points Test without which he would not have met essential criteria for the grant of a subclass 880 permanent visa.
31. Having concluded the above, the Tribunal then gave necessary consideration to whether the visa should be cancelled pursuant to s.109(1) of the Act by reference to regulation 2.41 of the Regulations. The Tribunal was satisfied that had the correct information, namely that the applicant never worked at Via Veneto restaurant, been provided by the applicant, then he would not have been granted the visa. The

Tribunal did not accept the applicant's charitable activities could "expiate an egregious and calculated fraud." The Tribunal described the applicant as a:

"willing and fully informed party to a joint criminal enterprise designed to secure for him a visa and immigration status to which he knew full well he was not entitled."

32. The Tribunal described the actions of the applicant as 'premeditated' and a 'deliberate deception' saying in paragraph 48 of its reasons

"His conduct involved a cynical betrayal of the trust and good faith on which the skills accreditation system, like many such administrative systems, almost inevitably relies in an era of dwindling public resources and risk management. The review applicant's misconduct represents an assault on the integrity of the Australian immigration system, and undermines the rationale for the Commonwealth's skilled migration program. In the final analysis, a scheme designed to bring skilled individuals, including cooks, into Australia has netted the country a security guard, who has never worked as a cook, or in any other skilled capacity, since acquiring permanent residency."

33. The Tribunal was satisfied the applicant's visa should be cancelled and affirmed the decision of the Delegate.

Consideration

34. Regulation 2.26B of the Regulations (as in force between 1 July 2006 and 30 June 2007) provided:

"2.26B Relevant assessing authorities

(1) The Minister may, by an instrument in writing for this subregulation, specify a person or body as the relevant assessing authority for a skilled occupation if the person or body is approved in writing by the Minister or Education as the relevant assessing authority for the occupation.

(2) The standards against which the skills of a person are assessed by a relevant assessing authority for a skilled occupation must be the standards set by the relevant assessing authority for the skilled occupation."

35. The First Respondent concedes that the TRA had not been validly specified under regulation 2.26B of the Regulations as the relevant assessing authority for the applicant's occupation at the time of the Tribunal's decision (*Gurinder Singh v Minister for Immigration and Citizenship* [2012] FMCA 145; *Batra v Minister for Immigration and Citizenship* [2012] FMCA 544). Nevertheless, the First Respondent submits that the TRA assessment was a 'bogus document' within the meaning of s.97(c) of the Act, and that the Tribunal was correct in finding that the applicant failed to comply with s.103, so as to enliven the power to cancel the applicant's visa under s.109 (*SHJB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 303). These submissions made by the first respondent in this hearing were upheld by Riley FM in *Batra v Minister for Immigration and Citizenship* [2012] FMCA 544.
36. The TRA assessment was obtained because of a false or misleading statement (i.e. the fabricated work reference). Accordingly, the TRA assessment was a 'bogus document' within the meaning of s.97(c) of the Act. The TRA assessment was given, presented or provided by the applicant 'to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under the Migration Act'. In *Minister for Immigration and Citizenship v Brar* [2012] FCAFC 30 the Full Court concluded that a statement in a s.107 Notice that a bogus document had been given to an officer rather than to an authorised system was not fatal to the Tribunal's jurisdiction under s.108(b) to decide whether there had been non-compliance with a relevant section in the Act. In other words, it was open to the Tribunal to treat any inaccuracy in the s.107 notice as a 'minor, technical imprecision' which did not affect the validity of the [Notice]. There was established non-compliance with s.103 of the Act which triggered the cancellation provisions.
37. The central premise of each of the grounds relied upon by the applicant is that because the TRA was not a relevant assessing authority, the TRA assessment could not have been material to the decision to grant the visa and therefore was not a bogus document for the purposes of s.103 of the Act. This premise was squarely rejected by Riley FM in *Batra v Minister for Immigration and Citizenship* [2012] FMCA 544 (at paragraph 48) where the learned Federal Magistrate said;

“I accept absolutely that the TRA skills assessment of the applicant had no legal effect, as a skills assessment. However, that does not mean that the skills assessment should be treated as never having existed, or as never having been sent to an officer or an authorised system.”

38. Accordingly, I find the applicant’s submissions that the TRA assessment should be treated as a ‘nullity,’ and therefore is incapable of being a ‘bogus document’ for the purpose of ss.97 and 103 of the Act is misconceived. The non-compliance with s.103 of the Act did not depend on whether the TRA was a ‘relevant assessing authority’ under regulation 2.26B of the Regulations, nor on whether the TRA assessment was material to the decision to grant the visa. The only facts necessary to establish non-compliance with s.103 are that the applicant provided to an officer or an authorised system a document that was obtained because of a false or misleading statement.
39. The Tribunal then looked to the prescribed circumstances in regulation 2.42 of the Regulations to the extent that they were relevant and had regard to the likely effect of the provision of the correct information by the applicant (that the applicant did not have the requisite work experience) on the grant of the visa. The Tribunal found that the visa would not have been granted. This finding of fact is not affected by any ‘invalidity’ of the TRA assessment arising from the fact that the TRA was not validly specified as a relevant assessing authority.
40. The Tribunal did what it was required to do and it was not unreasonable for it to rely on the TRA skills assessment to find a breach of s.103 of the Act which caused it to consider cancellation of the visa by reference to regulation 2.41 of the Regulations. Its findings of fact were open to it on the evidence. No jurisdictional error attends the reasons and the application shall be dismissed with costs following the event.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Hartnett FM

Date: 7 November 2012